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No. 96-243

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI CURIAE

The *amici* have received the parties' written consent to submit this brief. Letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

The *National Association of Home Builders* ("NAHB") represents over 185,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in myriad cases to safeguard the rights of landowners to use their property, and to ensure the availability of adequate remedies when those rights are infringed. These include *Agins v. Tiburon,* 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. San Diego,* 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)[1]; *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); and *Dolan v. Tigard,* 512 U.S. --, 114 S.Ct. 2309 (1994).

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly-owned subsidiary of the Building Industry Association of Southern California, whose 1400 members include a significant number of residential developers and associate

[1]The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

businesses accounting for 70% of all annual new home construction in the southern California region. The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." It promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

The impact of this case on the *amici* is staggering. Negotiating all types of zoning and permit processes, at all levels of government, is a daily fact of life for the members of NAHB and the BILD Foundation. Their development proposals face elaborate and often repetitive reviews from federal regulators, state agencies, and local zoning bodies. The *amici* fully support innovative measures, including fair programs to transfer development rights (unlike the one before the Court), that strike an equitable balance between economic growth, preservation of constitutionally-protected property interests, and environmental protection. However, the *amici*'s members typically confront the all too common prospect of regulations that go "too far"–such as the regime TRPA has foisted upon Mrs. Suitum. For that matter, any of NAHB's or the BILD Foundation's members could be standing in Mrs Suitum's shoes.

When the prospect exists that free speech may be silenced, or when reasonable expectations of privacy may be invaded, courts do not raise barrier after barrier before reaching the merits to determine whether, in fact, constitutional guarantees have been impinged. Mrs. Suitum's situation should not be viewed under a different lens. Her property rights, safeguarded by the Fifth and Fourteenth Amendments, have undoubtedly been violated: *no inch of her property can be developed.* Furthermore, her TDRs

contemplate that 99% of her property is valueless. Yet TRPA and two lower courts have artificially constrained her ability to seek judicial redress for a taking. They have achieved this result by distorting the Court's rulings on "ripeness."

Rationality must be interjected into the ripeness precedents. The Court should take full advantage of the opportunity.

SUMMARY OF ARGUMENT

This case is about court access and procedural fairness. The Court is not asked to decide whether Mrs. Suitum must be compensated for the taking that has occurred, but simply whether that issue is ripe for resolution.

1. The Court presently has the opportunity to clarify its finality holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). A takings claim is not ripe "until the government entity charged with *implementing* the regulations has reached a *final decision* regarding the *application* of the regulations to the property at issue." *Id.* at 186 (emphasis added). Accordingly, once a zoning agency adjudicates the extent to which a person can develop a plot of land (if at all), the harm to property interests is concrete *at that point.* A ripe "case or controversy" thereafter exists.

2. Zoning bodies and lower courts across the country have abused this ruling. They have fabricated additional obstacles before a court can assess the merits of a takings claim—even after the administrative agency has implemented its regulations for a final adjudication causing con-

crete deprivations of property rights. Mrs. Suitum's case represents the culmination of these misinterpretations.

3. TRPA has erected such stumbling blocks in front of Mrs. Suitum's local courthouse doors. The Agency's edict that Mrs. Suitum is unable to put the plot she owns to *any* economically viable use cannot be disputed. This decision is entrenched, but the Agency argues it is not final because of its seriously flawed program to transfer development rights. TRPA has convinced the Ninth Circuit and the district court that Mrs. Suitum's land can be valued only if she sells her TDRs. The lower courts have essentially determined that Mrs. Suitum *must sell* her development rights to some *unknown* third party. Furthermore, TRPA allows Mrs. Suitum to sell only 1% of her lot's "land coverage," while 99% of her property receives no value. Then, if she can consummate a TDR sale, she *must* record deed restrictions forever preserving her land in a virgin state. These facts alone cogently demonstrate the injury to her property interest. They ripen her takings claim *per se*.

4. Moreover, the TDR scheme at issue thrusts Mrs. Suitum into a world where her plot is valued with reference to "lotteries," "bonus units," and land uses that may or may not be permitted, on some other unidentified parcel, owned by some unidentified titleholder. In this regard, TRPA's TDR scheme is unfair and deprives Mrs. Suitum's property without due process. The outcome of this *valuation* process, when and if it will occur, will not displace the Agency's adjudicated conclusion that her property is off-limits, now and forever, to any land *use*.

TRPA's regulation of Mrs. Suitum's property goes "too far." Her takings claim is ripe *now*.

ARGUMENT

I. MRS. SUITUM'S CLAIMS ARE RIPE, BECAUSE TRPA HAS FINALLY ADJUDICATED THE EXTENT OF PERMISSIBLE LAND USES ON HER PROPERTY.

One of the "basic rationale[s]" of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967). The Court instructs that the "finality" element for ripeness must be interpreted "in a pragmatic way." *Id.* at 149-50. Litigation in the takings arena does not depart from the rudiments of a final decision causing concrete harm. Before a court can decide if government action has effected an unconstitutional taking without just compensation, a final decision must be obtained "regarding how [a property owner] will be allowed to develop its property." *Williamson County,* 473 U.S. at 191. This requires "the initial decisionmaker" to deliver "a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 192.

Under this standard TRPA's decision is "formalized" and "definitive," and Mrs. Suitum perceives its effects in a "concrete way": she cannot develop her plot. TRPA has reached a final decision that her land is within a Stream Environmental Zone ("SEZ"). As the district court recognized below, no variance procedure is available to permit construction on parcels, like Mrs. Suitum's, within a SEZ. *See* App. C at 2 (TDR sale is "the only avenue not yet pursued"). Additionally, because her land is in a SEZ, TRPA

permits Mrs. Suitum to sell "land coverage" rights that total only 1% of her lot's acreage. TRPA Code § 20.3.A, App. F-1. In other words, 99% of her plot is worthless under the regulation. "There is no hint that [TRPA's] decision is informal," and its draconian impact on Mrs. Suitum is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *See Abbott Laboratories,* 387 U.S. at 151.

A. For Ripeness Purposes, a Final Decision Requires that an Agency or Court Render Some Adjudication.

No issue remains that TRPA can, or must, resolve regarding the scope of permissible land uses on Mrs. Suitum's property, or the extent of her saleable rights. Accordingly, she has amply satisfied the finality requirement for a takings claim. A common thread connects this Court's ripeness opinions. That motif is "adjudication." Just compensation claims have been considered unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;[2] (2) submit to a process to obtain a permit that may allow development;[3] (3) apply for a variance or waiver from applicable land use regulations;[4] or (4) provide alternate

[2] *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) (takings claim challenging zoning ordinance held unripe, because property owners had not yet submitted development plans).

[3] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1011-13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim).

[4] *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 297 (1981) (Court rejects facial challenge to Surface Mining

or scaled-down development plans compared to an initial proposal.[5]

All of these avenues require some regulatory body to act in an adjudicative capacity. In each situation a hearing is held whereby the parties present evidence; thereafter, an administrative agency is called upon to issue some judgment, determination, or decree relevant to the factual findings it made. *See* BLACK'S LAW DICTIONARY at 39 (5th ed. 1979) (definition of "adjudication").

For example, "'[a] variance provides relief from the application of a land use regulation....For this reason, the granting of a variance is an adjudicatory function' ....

(..continued)
Control and Reclamation Act, because "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver ...."; thus, takings claim "not ripe for judicial resolution"); *Williamson County,* 473 U.S. at 192 (1985) (takings claim not ripe because developer had not sought variances from zoning ordinance). In addition to finality requirements, *Williamson County* added the additional hurdle that a takings claimant must first pursue inverse condemnation proceedings for a ripe claim. 473 U.S. at 194-95. The Ninth Circuit recognized below that only the "final decision requirement" is presently at issue. *Suitum,* 80 F.3d at 362.

[5] *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348 (1986) (property owners submitted only one subdivision proposal rejected by a zoning body; as alternative uses of the site existed other than the one proposed, the takings claim was unripe because the zoning body had not yet rendered "a final and authoritative determination of the type and intensity of development legally permitted on the subject property"); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 136-37 (1978) (property owners had not sought approval for any plan other than constructing a 50-foot office building above Grand Central Terminal; thus it was unclear whether the Landmarks Preservation Commission would deny approval for all uses).

Given the rationales for the ripeness doctrine, the final decision prong must be limited to adjudicatory relief. In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property." Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91, 111 (1994) (emphasis supplied).

As the Court recognized in *Williamson County,* a takings challenge ripens when "the initial decisionmaker has *arrived at a definitive position on the issue* that inflicts an actual, concrete injury." 473 U.S. at 193 (emphasis supplied). The Court thus censured the developer-respondent for failing to ask that the planning commission adjudicate variance requirements for density and other site-related matters. *Id.* at 188. In other words, the Court believed certain avenues were still available for the planning commission to decide permissible land uses upon a factual record, where the commission could (or could not) have found in the developer's favor.

B. TRPA has Already Decided that Mrs. Suitum Cannot Develop her Property. The TDR Scheme at Issue Requires No Further Adjudication to Confirm this Result.

In contrast, the decision here is final because there is nothing *left* for TRPA to adjudicate. Mrs. Suitum submitted plans to construct a house in 1989. TRPA thereafter decided that *no* development would be allowed because the parcel is within a SEZ. Submitting a scaled-down proposal *à la MacDonald* would have thus proved futile. Mrs. Suitum then appealed TRPA's decision to the

Governing Board for adjudication which, after a public hearing, denied her claim on November 29, 1990. No avenue remains to challenge the SEZ classification, or TRPA's conclusion that her land is utterly unusable. Now she is forced to sell her property rights in the form of TDRs.

Assuming Mrs. Suitum beats the odds stacked against her and locates some eligible purchaser through TRPA's unfair TDR process (*see infra* at 18-21), no issue remains for the Agency to adjudicate: it would merely approve the sale. That approval will not alter the foregone conclusion that her plot is undevelopable, nor will it expand the amount of Mrs. Suitum's marketable land coverage from its minuscule 1%. *Moreover, if she cannot locate a TDR buyer, TRPA's code provides for no waiver or variance procedure to get out from under the SEZ pigeonhole.* The district court below recognized as much. *See* App. C at 2.

In short, the procedures leading to the SEZ categorization, and the TDR process, are mutually exclusive. The Agency's unforgiving decision that Mrs. Suitum cannot build her home, or anything else, does not rest on some ripening agent in the form of a hypothetical TDR sale.

The Ninth Circuit below stated that the "[b]y failing to apply to the TDR program, Suitum denied TRPA the ability to grant a 'different form[] of relief ... which might abate the alleged taking.' " *Suitum,* 80 F.3d at 362; App. A-9 (citing *Southern Pac. Transp. Co. v. Los Angeles,* 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991)). However, the "different form[s] of relief" contemplated by *Southern Pacific Transportation* all require an exercise of adjudicative decisionmaking and, thus, are

inapposite to the TDR scheme at issue. For example, the appellants in *Southern Pacific Transportation* did not submit a "meaningful application" to provide "local decisionmakers ... an opportunity to review at least one reasonable development proposal ..." *Id.* at 503, 504. The federal court was "required to guess ... how the City might have responded to these imaginary applications ...." *Id.* at 504. In contrast, TRPA's decision *now* is that Mrs. Suitum's land is within a SEZ, it is off-limits to development, and 99% of her acreage is worthless.

The present process for selling TDRs is thus distinguishable from a variance adjudication process, and the Ninth Circuit was incorrect in concluding that they both "effect[ ] the same purpose." *Suitum,* 80 F.3d at 363; App. A-9. The Agency's settled verdict would not change after some imaginary TDR sale closes.

C. The Court should Resolve the Confusion Engendered by *Williamson County,* and Clarify that a Takings Claim is Ripe Once there is a Final Adjudication on the Extent of Permissible Land Uses.

The lower courts have lost sight of the requirement that a final *adjudication*, regarding what a landowner can and cannot do on her property, is needed to ripen a takings claim. As a result, one survey reveals that less than 6% of land use takings cases between 1983-1988 had been found ripe for review. *See* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause, supra,* 10 J. LAND USE & ENVT'L L. at 92, n.3. Such opinions have caused hardship and despair to persons who, like Mrs. Suitum, seek court

access so their legitimate takings and due process claims can be heard.[6]

NAHB respectfully submits that *Williamson County* itself has spawned this confusing and harsh array of decisions. The success of the Planning Commission there in obfuscating the role of boards of zoning appeal in the land use process, particularly regarding their authority to adjudicate appeals from decisions of administrative agencies, is the genesis of the "ripeness mess." *See generally* Michael M. Berger, *The "Ripeness" Mess in*

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[6] *See, e.g., Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993) (takings claim not ripe where landowner "did not attempt to modify the location of the units or otherwise seek to revise its application"; no indication regarding how many reapplications are necessary before claim ripens); *Tahoe-Sierra Preservation Council, Inc. v. TRPA,* 911 F.2d 1331, 1136 (9th Cir. 1990), *cert. denied,* 499 U.S. 943 (1991) (even where agency determines extent of permissible land uses, takings claim unripe because landowner must lobby to amend the zoning ordinance; less than a year later, the Ninth Circuit reversed in part, 938 F.2d 153, 157 (9th Cir. 1991) (ripeness does not require landowner to seek legislative amendment)); *St. Clair v. Chico,* 880 F.2d 199, 203 (9th Cir. 1989) (takings claim not ripe because property owner could have scaled down the proposal and negotiated "political concessions" with the agency); *Kinzli v. Santa Cruz,* 818 F.2d 1449, 1454-55 (9th Cir. 1987), *cert. denied,* 484 U.S. 1043 (1988) (land downzoned to open space classification, upon which no development could occur; takings claim nevertheless unripe because property owner never submitted a development plan); *Carpenter v. TRPA,* 804 F. Supp. 1316, 1325 (D. Nev. 1992) (implying property owner must scale down proposal and seek transfer of TDRs for *future* projects, before takings claim will ripen); *Villas of Lake Jackson, Ltd. v. Leon County,* 796 F. Supp. 1477, 1480-81 (N.D. Fla. 1992) (takings claim unripe because property owner did not allege in complaint that he requested approval of permits that *required,* under county ordinance, that 95% of his property remain undeveloped); *Weissman v. Fruchtman,* 700 F. Supp. 746, 754 (S.D.N.Y. 1988) (to ripen takings claim, property owner must first obtain certificate from another agency verifying that landlord did not harass tenants).

Federal Land Use Cases, 1991 INST. ON PLANNING, ZONING AND EMINENT DOMAIN, 7-1—7-38 (SW. LEGAL FOUND.).

The underlying record in *Williamson County* reveals that the developer, at the written suggestion of the County Planning Commission, had in fact obtained an adjudicated and final decision in 1980 from the Board of Zoning Appeals ("BZA"). Acting under its statutory authority to hear appeals from decisions of County officials, the BZA affirmatively decided that a 1977 ordinance, which would have drastically curtailed the project's approved density compared to the 1973 law, did *not* apply to the developer's plan. *See Williamson County,* 473 U.S. at 180 n.3, 181. "[S]everal approvals" had already been granted under the 1973 ordinance. *Id.* at 179, n.2, 181; Brief of Respondent, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (No. 84-4) at 11. The Planning Commission actively participated in the BZA proceedings regarding the governing law issue, and was represented by counsel. (*See* Transcript of Proceedings Before Supreme Court ("Tr."), *Williamson County,* at 44.) It lost. (Tr. 7.)

Yet, the record reflects that *the Planning Commission never sought judicial review of this BZA ruling.* (Tr. 8, 45.) Thus, it appears that the developer *did* obtain a final adjudication concerning the application of the zoning ordinance and subdivision regulations to its property.

At that point, it was incumbent on the Commission to obtain judicial review of the BZA's ruling. Nevertheless, the Planning Commission "declined to follow" the BZA's

decision. *Williamson County,* 473 U.S. at 181-82.[7] It maintained that the developer–not the Planning Commission–failed to obtain the requisite final decision regarding the correct governing ordinance, *when in fact the BZA had already resolved that issue in the developer's favor. Id.* at 181-82, 188-90. Specifically, the Planning Commission argued that the developer should have returned to the same BZA and applied for variances from density and other requirements that had been enacted subsequent to 1973.[8]

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[7] At oral argument, Justice Brennan inquired why the Planning Commission "didn't go to a court" to challenge the BZA's decision. Petitioner's counsel responded that the Commission expected the developer to present a new plat. (Tr. 8.) Following a recess, counsel further explained that the Commission "relied upon" an opinion of the Attorney General for the State of Tennessee, rendered "shortly after" the BZA's decision, stating "in effect" that the BZA lacked jurisdiction in the matter. (Tr. 10.) That opinion was never identified, nor made part of the record. Its date is unknown. It is not cited in any of Williamson County's briefs or in the Court's decision. Even if the Planning Commission relied on some Attorney General opinion, this would not detract from the finality of the BZA's decision, nor would it excuse the Commission's failure to seek court review of the BZA's adjudication.

[8] It appears that the Planning Commission in *Williamson County* apparently settled these issues when it granted variances while the case was pending at the circuit level. 473 U.S. at 184, n.7. Moreover, these variances presumably would have readdressed those issues, including the overarching question of allowable density, that the BZA determined in its 1980 decision, as well as subsidiary issues that arose after regulatory amendments enacted since 1973 (such as length of cul de sacs, road grade, and frontage requirements). *Williamson County,* 473 U.S. at 179-80, 188, n. 9. As the BZA decided that post-1973 regulations were inapplicable, it is questionable whether variances were even needed. No variance is required when proposed development is consonant with applicable zoning regulations. *See Del Monte Dunes v. Monterey,* 920 F.2d 1496, 1502 (9th Cir. 1990).

The BZA, however, already disposed of this issue in its unchallenged 1980 ruling. *Id.*

To conclude, "the takings clause of the Fifth Amendment, [is] as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, [and] should [not] be relegated to the status of a poor relation ...." *Dolan v. Tigard,* 512 U.S. ---, 114 S.Ct. 2309, 2320 (1994). Deprivations of Mrs. Suitum's property rights merit the same level of judicial access and scrutiny as any other constitutionally protected interest. When property is taken by final agency action without compensation, lower courts are not asked to sit as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989). Such condescension of federal courts against land use cases[9] "forget[s] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922) (Holmes, J.) Mrs. Suitum has called upon the federal courts to perform their unique task of testing the constitutional parameters of government action. *Williamson County* should no longer be misused to gut takings challenges where, as here, concrete and ascertainable injuries flow from adjudicated and final land use decisions.

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[9]Commentators have recognized that "federal courts seem to consider land use takings cases unimportant." Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause, supra,* 10 J. LAND USE & ENVT'L. L. at 92 (noting that one decision confronting violations of the Fifth and Fourteenth Amendments viewed the case as simply "a garden-variety zoning dispute dressed up in the trappings of consti-

II. TRPA'S TDR SCHEME DEPRIVES MRS. SUITUM OF HER PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty or property without due process of law." U.S. CONST. AMEND. XIV. A regulation that "goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." *Williamson County,* 473 U.S. at 198. This is the case here.

A. TRPA's Scheme Deprives Mrs. Suitum Her Property Rights in a Manner that is Unfair Both Procedurally and in Appearance.

In *Williamson County,* Justice Stevens wrote in concurrence:

> "The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations.... *[A]s long as fair procedures are followed,* I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a "taking" of private property." 473 U.S. at 205 (Stevens, J., concurring) (emphasis supplied).

In marked contrast, unfair procedures mar the focal TDR scheme. TRPA has imposed a "regulation ... so onerous

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(..continued)
tutional law." *See Coniston Corp. v. Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988)).

that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County,* 473 U.S. at 200.

To preserve the notion of "fundamental fairness" *Solesbee v. Balkcom,* 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) inherent to due process, rational procedures must be employed whenever the government deprives an individual of a property interest. *See, e.g., Lindsey v. Normet,* 405 U.S. 56 (1972) (recognizing tenant's property interest in suit seeking to prevent imminent state-enforced eviction); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) (procedural due process violated by statutory provisions for triennial judicial settlement of trust estate accounts, because an inadequate method of notification denied some beneficiaries the opportunity to participate in control of their property); *Pennoyer v. Neff,* 95 U.S. (5 Otto) 714 (1878) (addressing issues of personal jurisdiction and procedural due process to recover possession of tract of real property), *overruled on other grounds, International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

Above all, procedures impinging on Mrs. Suitum's property rights must at least *appear* fair, to instill in her the confidence that TRPA equitably considered her situation. "[A]part from avoiding the risk of actual error, this Court has stressed the importance of adopting procedures that preserve the appearance of fairness and the confidence of [individuals] in the decisionmaking process." *Greenholtz v. Inmates of Neb. Penal and Correctional Complex,* 442 U.S. 1, 34, 35 (1979) (Marshall, J., dissenting in part) (due process contemplates "the need to assure the appearance, as well as the existence, of fair-

ness"). *See also Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980) (procedures that deprive life, liberty or property must boast "the appearance and reality of fairness, to 'generate[] the feeling, so important to a popular government, that justice has been done' "; citation omitted).

In this regard, TRPA's actions should be carefully scrutinized. Government conduct at the local level has been considered particularly rife with potential to abrogate due process. "It is probably true that 'the most significant feature of small town politics is the frequency with which legal and procedural requirements are overlooked and ignored....so as to take account of unique conditions;' such '[p]ersonalized government even at the local level can be as offensive as it may be intimate and effective...." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-1 at 630 (2d ed. 1988) (quoting WOOD, SUBURBIA 278-80 (1958)).

B. TRPA's TDR Scheme Does Not Provide Meaningful Postdeprivation Process.

The "Constitution is satisfied by the provision of meaningful postdeprivation process" such as, in the takings context, eminent domain proceedings under state law. *Williamson County,* 473 U.S. at 195. *See also Parratt v. Taylor,* 451 U.S. 527, 539 (1981) ("the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process"), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986).[10] Here, eminent domain proceedings are not

[10] The Court relied on *Parratt* in its discussion on postdeprivation process in *Williamson County,* 473 U.S. at 195.

at issue (*see supra* note 4). TRPA has decided Mrs. Suitum cannot build on her SEZ property at all (*i.e.*, the "initial taking"), and the TDR scheme at issue does not afford her "meaningful postdeprivation process" because: (1) it requires Mrs. Suitum to consummate a sale, that may never occur, with some unknown third party purchaser regarding some unidentified plot of land; (2) it created Mrs. Suitum's development rights in the first instance in an arbitrary manner; and (3) like a physical taking, it treads too heavily on Mrs. Suitum's property rights by *forcing* her to sell them. At the very least, the TDR scheme at issue strains the outer limits of due process because it lacks even the basic appearance of fairness.

1. Mrs. Suitum Must Sell Her Rights to an Unknown Purchaser for an Unidentified Parcel. Former Chief Judge Breitel of the New York Court of Appeals struck down a TDR program similar to TRPA's, as applied to real estate in midtown Manhattan:

> In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the city, *but not to any particular parcel or place.* There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. *But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.*

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 597-98, 350 N.E.2d 381, 387-88, 385 N.Y.S.2d 5, 11, *cert. denied*, 429 U.S. 990 (1976).

Similar flaws hamper TRPA's TDR scheme. Unlike other TDR programs that have met judicial endorsement,[11] no receiving properties or purchasers have been identified with any specificity sufficient to deny Mrs.

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[11] *See, e.g., Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 328, 334, 366 N.E.2d 1271, 1273, 1277, 397 N.Y.S.2d 914, 916, 920 (1977) (opinion by Chief Judge Breitel) (severable air rights transferable to eight identified receiving parcels, several of which had already been owned by the same developer, and already found suitable for the construction of new office buildings), *aff'd*, 438 U.S. 104, 137 (1978); *West Montgomery County Citizens Ass'n v. Maryland-National Capital Park and Planning Comm'n*, 309 Md. 183, 188-89, 191, 522 A.2d 1328, 1330-31, 1332 (1987) (zoning text established "receiving zones" for development rights, and master plan created 27 TDR receiving areas, with defined boundaries and assigned density increase limitations; however, designation of specific receiving areas and densities struck on procedural grounds, because they were not located on the zoning map but on the master plan).

Suitum's property *with* due process. TRPA places her at the mercy of market trends, entirely beyond her control. The Agency (incorrectly) insists that, before her takings claim ripens, she *must* locate a purchaser, even if she is forced to sell her rights at bargain-basement prices during a depressed real estate cycle.

Moreover, assuming Mrs. Suitum can find a *ready and willing* TDR buyer, he must also be *able* to use those rights. Before Mrs. Suitum's sale can be consummated, the unidentified purchaser must submit to TRPA's zoning procedures to determine *his own* eligibility to use the TDRs. In other words, Mrs. Suitum's due process in selling her property rights depends *on someone else's process* in determining his eligibility to use them. Her Fourteenth Amendment guarantees hinge on an anonymous purchaser's ability to successfully negotiate TRPA's land use labyrinth. [12]

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[12] In *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621 (1981), Justice Brennan, in dissent, criticized the *Fred F. French* decision because it adopted Justice Brandeis' view that the proper and sole remedy for a regulatory taking was invalidation of the regulation, not the payment of compensation. 450 U.S. at 649 n. 14 (Brennan, J., dissenting); *cf. Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 417-18 (1922) (Brandeis, J., dissenting). In his criticism of *Fred F. French,* however, Justice Brennan did not challenge Chief Judge Breitel's reasoned analysis of New York City's TDR scheme. While the *amici* agree with Justice Brennan's conclusion that just compensation is the appropriate remedy when a regulation "goes too far" *as a taking,* we also believe that Chief Judge Breitel's criticism of the defective process in *Fred F. French* is correct, and further note that the Court upheld his findings on the much fairer TDR regime in *Penn Central.* However, "[t]he *remedy* for a regulation that goes too far, *under a due process theory,* is ... invalidation of the regulation, and, if appropriate, actual damages." *Williamson County,* 473 U.S. at 198 (emphasis supplied).

By mandating a TDR sale before it can allegedly value Mrs. Suitum's property, TRPA has improperly exercised its police power to achieve "what constitutionally can be accomplished only through the exercise of eminent domain." *Williamson County,* 473 U.S. at 199 (interpreting opinions of Justice Holmes including, *inter alia, Pennsylvania Coal,* 260 U.S. at 413). Rather than proceeding, as the Constitution requires, by eminent domain and purchasing Mrs. Suitum's property itself, TRPA is forcing her to find a private party to acquire whatever rights she possesses through a defective TDR process. Accordingly, TRPA has assumed the convenient position of both player *and* referee.

2. TRPA has Created Mrs. Suitum's TDRs in an Arbitrary Manner. Whether a property right exists is a question of state law. *See, e.g., Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) ("state law is the source of those strands that constitute a property owner's bundle of property rights"). However, a state cannot create or deny those property rights in an arbitrary manner anathemic to due process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985) (once a state has created a property right, the federal Constitution answers remaining questions regarding what process is due); *Bishop v. Wood,* 426 U.S. 341, 344, 347 (1976) (Fourteenth Amendment Due Process Clause protects state-created property interest in public employment). TRPA has decided that Mrs. Suitum's rights to transfer development are interests that run with her land. However, the Agency has created these TDRs irrationally, without correlation to offset the severe development restrictions placed on her parcel.

(a) Development Allocations. One of the rights TRPA has created is a "development allocation." A property owner needs one allocation for every residential unit she plans to build. The county in which a parcel is located serves as a clearinghouse for obtaining allocations, as they do not automatically attach to a piece of land. In Mrs. Suitum's county, 6 of its 60 annual allocations are reserved for parcels in a SEZ or other zone where development is prohibited. To obtain one of these 6 allocations, *Mrs. Suitum must enter and win a lottery. See* Affidavit of Lyn Barnett, ¶¶ 10, 11, CR 74. Odds at winning presumably vary from year to year, depending on the universe of participants. Accordingly, one of the "sticks" in Mrs. Suitum's TDR "bundle" rests entirely on luck. Due process should not countenance TRPA's game of chance.

(b) Residential Development Rights. Each vacant residential parcel automatically receives one residential development right. As a consolation prize, Mrs. Suitum receives three "bonus units" because her undeveloped property falls in a SEZ; she can thus sell a total of four development rights to a builder of a multi-unit project (if one can be found). *See* TRPA Code §§ 35.2.C, 35.2.D(4)(b); App. F-10-11. A scheme premised on "bonus units," created by a property owner's misfortune in owning a lot decreed off-limits to development, smacks of unfairness. It *appears* arbitrary. Surely this system does little to restore Mrs. Suitum's confidence in TRPA's land use planning methods.

(c) Land Coverage. Each lot has a percentage of allowable "base coverage" depending on that parcel's classification. This area can be sold for additional "land

coverage" to a TDR purchaser. Under this regime, Mrs. Suitum can sell 183 square feet of base coverage. Her property rights are ascertained simplistically because her lot occupies 18,300 square feet; in a SEZ, base coverage is *automatically* 1% of lot size, and 99% of the area is *automatically* not for sale. *See* TRPA Code §§ 20.3.A; App. F-1. To determine Mrs. Suitum's saleable property rights, TRPA has not made even the slightest effort to carry its burden in assessing the environmental impacts that development on her property would occasion. The Court has instructed, however, that zoning bodies must "make an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. Tigard,* 512 U.S. ---, 114 S.Ct. 2309, 2319-20 (1994) (city bears burden to show that regulation is "roughly proportional" to project impacts). Such a determination would not be an overly difficult task for TRPA. Mrs. Suitum's lot is in a residential subdivision and is surrounded by houses on three sides. (A paved street borders the fourth side.) Data on environmental impacts from these homes could be easily ascertained, and is a small price to pay to safeguard Mrs. Suitum's due process rights.

3. TRPA's Scheme As Applied to Mrs. Suitum Approaches a Physical Taking, Because it Forces the Sale of Her Property Rights Before They can Allegedly be Valued. The district court recognized that "the only avenue not yet pursued" by Mrs. Suitum is selling her development rights. App. C at 2. The Ninth Circuit confirmed: "Without attempting to transfer the rights she possesses, Suitum cannot know ... the regulation's full economic impact ...." *Suitum,* 80 F.3d at 362; App. A-9.

The *amici* seriously dispute that Mrs. Suitum's property can only be valued by reference to a TDR sale. In any event, TRPA has convinced the lower courts that, if Mrs. Suitum wants to know the worth of her property, she *must* sell her rights in it to some anonymous private purchaser. This genre of forced sale is markedly different from a variance, waiver or other permit-type process. Those procedures simply ask a government body to determine permissible land uses. They do not mandate that a landowner traffic her land to quantify investment-backed expectations.

In this regard, TRPA's TDR scheme as applied to Mrs. Suitum's property fairly resembles a physical taking. The Court recognizes that the "element of required acquiescence is at the heart of the concept of [*per se* takings]." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (statute *required* landlords to submit to installation of cables and switching boxes). Hence, the "character of the government action" is the determinative factor in the *per se* takings calculus. *Loretto*, 458 U.S. at 426. Any government regime that *forces* someone to sell property rights to a private party, before such rights can allegedly be valued, is "a property restriction of unusually serious character," *id.*, and, without more, should yield a ripe takings claim.[13]

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[13]The character of TRPA's impact on Mrs. Suitum's rights rivals in severity those situations where a *per se* taking was found. *See, e.g., Loretto*, 458 U.S. at 438 n. 16 (cable box invades 1½ cubic feet of space). Moreover, in physical takings cases, the Court does not require an actual intrusion as such, but the practical equivalent to one. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 180

The Ninth Circuit considered the takings ripeness requirement in *Azul Pacifico, Inc., v. Los Angeles*, 948 F.2d 575 (9th Cir. 1991), *cert. denied*, 506 U.S. 1081 (1993). It decided that a final decision *always* exists for ripeness purposes where there is a physical invasion of property. Such a "'taking occurs at once, and nothing the city can do or say after that point will change that fact'.... Because a physical invasion is itself a final government action, the ... *Williamson* ripeness requirement [for a final decision] is always satisfied in such cases.'" *Id.* at 579 (citation omitted).

This is the precise situation here. As in *Azul Pacifico*, TRPA's severe impingement on Mrs. Suitum's property interests are manifest and need not be evidenced by any proof other than the regulation's application to her plot. There is nothing TRPA, or this Court, can say or do at this point to mitigate the facts that: (1) Mrs. Suitum's land is in a SEZ; (2) she can never build a house (or anything else) on her plot; (3) 99% of her lot's coverage is rendered valueless; and (4) she is now forced to sell whatever property rights she has before they can purportedly be

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(1979) (imposition of navigation servitude did not physically expropriate private property, but invited trespassers to so intrude; "even if the Government physically invades only an easement in property, it must ... pay compensation"); *United States v. Causby*, 328 U.S. 256, 261 (1946) (plane flights in airspace overhead private property constituted a compensable taking; invasion was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it").

valued.[14] *See also Loretto,* 458 U.S. at 437-38 (whether a *per se* taking has occurred "presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute").

Moreover, if Mrs. Suitum executes a TDR sale, she must record "deed restrictions, or other covenants running with the land, permanently assuring" that her plat remains in a natural state. TRPA Code § 20.3.C(7)(a)(iii).[15] Such deed restrictions work a "practical ouster of possession." *Northern Transp. Co. v. Chicago,* 99 U.S. 635, 642 (1879). They "effectually and permanently dispossess [Mrs. Suitum] as if [they] had destroyed that amount of ground." *See St. Louis v. Western Union Telegraph Co.,* 148 U.S. 92, 99 (1893) (placement of telegraph poles by telegraph company on city's public streets). The fact that Mrs. Suitum may retain "bare legal title" is of no moment. The mandated deed restrictions "empty the right of any value, since the purchaser [of the *land*] will also be unable to make any use of the property." *Loretto,* 458 U.S. at

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[14]Certainly government regulation that forces vending of the *actual* real estate owned by a private person, to another private person, would ripen a takings claim. There is no meaningful distinction between this scenario and TRPA's mandate for a sale of *rights* in the actual land.

[15]In *Loretto,* the Court remarked that a physical taking "forever denies the owner any power to control the use of the property; he not only cannot exclude others, but he can make no nonpossessory use of the property." 458 U.S. at 436. Here, Mrs. Suitum also lacks the ability to control land uses *on* her property because of the deed restrictions she must record. Moreover, a nonpossessory "use" is the *only* "use" to which she can avail herself: Mrs. Suitum *must sell her rights,* and she cannot build *anything* on her land.

436. "[F]orcing someone to stop doing things with his property—telling him 'you can keep it, but you can't use it'—is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." TRIBE, § 9-3 at 593.

To summarize, TRPA compels Mrs. Suitum to sell her rights, which will inevitably leave 99% of her land with no value, and she must record restrictive covenants so that no part of her property can ever be developed. These final steps formalize what TRPA has already decided: namely, that her land is part of a SEZ and is not conducive to any construction. She has no option but to abide by these mandates. Her claim is ripe *per se* because these injuries, inflicted upon her by TRPA's TDR scheme, patently deprive her property rights without due process.

III. CONCLUSION

A. Mrs. Suitum's takings claim is ripe because there is no adjudicative decision that TRPA, or any other agency, must render to further ascertain the degree of allowable land uses. It is a foregone conclusion that Mrs. Suitum's plot is entirely undevelopable. A TDR sale, if one can be consummated, provides no additional opportunity for TRPA's adjudication on permissible development. Nor would a TDR sale change the result that Mrs. Suitum can market only 1% of her plot's coverage.

B. Mrs. Suitum's claim that TRPA has "gone too far" is ripe because the Agency has invalidly exercised its police power in a manner depriving her property without due process. TRPA created her TDRs in an arbitrary manner in the first instance. It has then forced upon her

an irrational procedure through which she must sell her gossamer rights, thereby shunning exercise of its eminent domain power.

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